Subject Index

	Page
Preliminary statement	1
A final disposition in the District Court is not imminent	2
1. The action is not presently set for trial	3
2. Answers have yet to be filed in the District Court by defendants	3
3. Discovery has not yet been completed	3
4. The appropriate Trial Court has not yet been determined	4
5. The occurrence and the effect of any new legislation is a matter of speculation	5
A present case and controversy is before the Court	5
Conclusion	8

Table of Authorities Cited

Cases	Pages
City of Tacoma v. Taxpayers, 357 U.S. 320 (1958)	6
S. W. Sugar Co. v. River Terminals, 360 U.S. 411 (1959)	8
Trade Comm'n v. Goodyear Co., 304 U.S. 257 (1938)	7
United States v. Phosphate Export Assn., 393 U.S. 199 (1968)	7, 8
Walling v. Helmerich & Payne, 323 U.S. 27 (1944)	7, 8

Statutes

28 U.S.C. Section 2281	4

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-1023

HENRY W. KERR, et al., *Petitioners,*

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*

JOHN VAN GELDERN, et al., *Real Parties in Interest.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MEMORANDUM OF PETITIONERS IN OPPOSITION TO SUGGESTION OF MOOTNESS

PRELIMINARY STATEMENT

This action has brought before the Court two sets of decisions which involve the compelled production of confidential state documents for adversary inspection by plaintiffs in an action now pending in the United States District Court. The significance of the issues is evident from the Brief for Petitioners, filed on July 25, 1975.

Instead of submitting a brief on the merits, plaintiffs (real parties in interest in this proceeding) have sought to avoid review in this Court by filing on August 4, 1975, a memorandum asserting that the case in the district court has become moot.[1] Plaintiffs' premature suggestion of mootness, however, is based on contingencies, the occurrence and effect of which are now conjectural.

The matter has not become moot in the district court because the action is not presently set for trial; other discovery has not been completed; the appropriate court for trial has not yet been determined; the occurrence and effect of legislative action is a matter of speculation; there may be a need for further discovery; the discovery orders to be reviewed are outstanding and stayed only by these proceedings, and because plaintiffs persist in their asserted interest in the documents encompassed by these orders. The matter also is not moot in the Court of Appeals as the published opinion and order of that court remain in effect stayed only by these proceedings. There is a present case and controversy in this Court.

A FINAL DISPOSITION IN THE DISTRICT COURT IS NOT IMMINENT

Plaintiffs' suggestion that the action in the district court will soon terminate is speculative, and, given the

[1]Soon after filing of this memorandum plaintiffs requested by letter that the time for filing their brief be enlarged until thirty days after a ruling that the case was not moot. However, on August 11, 1975, plaintiffs were notified by the Clerk that their brief was due on September 25, 1975.

actual posture of the proceedings in the district court, is unwarranted. The suggestion is also premature.

1. The action is not presently set for trial.

On July 31, 1975, in a ruling from the bench, the district court set aside the previously scheduled trial date. This action was prompted by a motion by plaintiffs for an extension of the trial date. The district court did not set a new trial date, but rather scheduled a hearing for that purpose for September 19, 1975.

2. Answers have yet to be filed in the District Court by defendants.

On June 25, 1975, the district court, ruling from the bench, granted plaintiffs' motion to file a second amended complaint which deletes some claims and adds new claims and seven new defendants. The second amended complaint was filed on July 1, 1975, and was received by defendants on July 7, 1975. Motions for dismissal were filed by these new defendants and the original defendants on August 6, 1975, and are scheduled for hearing on August 28, 1975. The filing of answers to the second amended complaint must await the disposition of these motions for dismissal.

3. Discovery has not yet been completed.

The district judge has yet to rule upon several motions by defendants to compel discovery. On June 10, 1975, the magistrate filed findings and recommendations that these motions of defendants be granted. Plaintiffs thereafter sought review before the district

judge. On July 31, 1975, ruling from the bench, the district judge remanded the matter to the magistrate for further consideration in the light of points and authorities which plaintiffs furnished to the district court but not to the magistrate. If defendants' ultimately prevail on these matters, in whole or in part, plaintiffs will be required to produce extensive material which is crucial to defendants' preparation for trial. The discovery matter is still pending before the magistrate.

In the memorandum on mootness, plaintiffs themselves express an interest in further pretrial discovery where they state: "[c]hanges to the parole-granting system, which are being made by defendants, will likely require respondents [plaintiffs] to amend their complaint and probably engage in further discoveries; . . ." (Memorandum of Respondents at 5).

Similarly, discovery by defendants with respect to the second amended complaint has not yet been undertaken.

4. The appropriate Trial Court has not yet been determined.

On July 8, 1975, by reason of new allegations in the second amended complaint, defendants filed notice of the requirement of a three-judge district court under Title 28, U.S.C. section 2281. Defendants have also given notice, under local court rules, that the instant case is related to another case pending in the district which also seeks to enjoin, on constitutional grounds, the California indeterminate sentence law. Both matters have not been formally ruled upon.

5. The occurrence and the effect of any new legislation is a matter of speculation.

In support of the plaintiffs' request that the filing of a brief on the merits be deferred pending a resolution of the issue of mootness, plaintiffs suggest that the action in the district court will become moot if certain legislation, described as Senate Bill 42, becomes law. Final legislative and executive action on this bill is a matter of speculation at this time. The bill has passed the California Senate; however, it has been in committee in the California Assembly since June 1975. The legislative session will end on September 15, 1975. Even if the bill should become law, its effect on the action may depend on the final language employed and its effective date, and this is all very conjectural at this time.

In short, any suggestion that proceedings below will render the issues presented to this Court moot is certainly premature and speculative. Given the number of items which are currently pending and unresolved, a final disposition of the action is in no way imminent.

A PRESENT CASE AND CONTROVERSY IS BEFORE THE COURT

The status of the case in the district court dispels any suggestion of mootness. Plaintiffs' memorandum sets forth no basis for a contrary conclusion. A present case or controversy is before the Court.

The issues before this Court focus on certain confidential state documents. Plaintiffs persist in urging

that "these documents remain crucial to respondents' [plaintiffs'] case. . . ." (Memorandum of Respondents at 4). As further stated by plaintiffs, proceeding to trial without the documents exposes plaintiffs to "the risk of failing to prove their case due to the absence of the crucial documents sought pursuant to Rule 34." (Memorandum of Respondents at 6).

In an attempt to suggest that the matter is nevertheless moot, plaintiffs state: "Respondents [plaintiffs] no longer seek any of the documents which are the subject of this appeal, *because* the trial of this case in the District Court will be completed before this Court is able to decide the issues before it, all of which concern access to documents which were to be used only for trial purposes." (Emphasis added) (Memorandum of Respondents at 1-2). This statement is a *non-sequitur*. Trial in the district court not only has not been commenced or completed, but also trial is not even scheduled. Accordingly, plaintiffs' claim that they no longer seek the documents is conditioned upon an event which has not occurred, and the time of whose occurrence is itself subject to numerous variables. *cf. City of Tacoma v. Taxpayers,* 357 U.S. 320, 333 (1958). In light of plaintiffs' continued assertion that the documents are crucial, it must be concluded that until such event has occurred plaintiffs will continue to seek the production of the documents.

Plaintiffs' request for production of documents was filed more than two years ago, on June 21, 1973 (A. 51). As is apparent from the pleadings in the Appendix in this case, plaintiffs have vigorously contested

all efforts by defendants to preclude indiscriminate disclosure of the confidential materials. Now that a definitive determination is imminent, plaintiffs state that they "cannot afford either to prolong this litigation for an additional year or to pursue in this Court a question not dealing with the merit or trial of their underlying claim." (Memorandum of Respondents at 6).[2]

Plaintiffs' assertion that it would be uneconomical to pursue their long-standing demand does not render the case moot. *See United States v. Phosphate Export Assn.,* 393 U.S. 199, 203 (1968). Voluntary discontinuance of a challenged practice does not operate to render a case moot. *See Walling v. Helmerich & Payne,* 323 U.S. 27, 43 (1944); *Trade Comm'n v. Goodyear Co.,* 304 U.S. 257, 260 (1938). Plaintiffs have consistently and vigorously contended that they were entitled to the documents and defendants have consistently objected to such production absent an *in camera* inspection to evaluate the claims of privilege and confidentiality. In the absence of a determination of the legal rights of plaintiffs and defendants, plaintiffs would be free to make analogous demands during

[2]This is not the first occasion upon which plaintiffs have sought to avoid review by representing a lack of interest in discovery theretofore demanded with vigor. Plaintiffs' response to defendants' petition for mandamus [compelled disclosure of inmate files; compelled recording of Adult Authority hearings] asserted for the first time they were no longer interested in further recordings. *See,* Brief for Petitioners, n. 6, pages 11-12. This tactic, no doubt, went far to dissuade the Court of Appeals from reaching the merits of the petition in No. 74-3392. Recordings were nevertheless resumed during April-May 1975, at plaintiffs' request, on the basis of changes instituted by the Adult Authority for parole consideration procedures effective March 1975. *See,* Brief for Petitioners, pages 21-22.

the future course of this litigation. (*See supra* n. 2, page 7). The orders of the district court, as well as the decision of the Court of Appeals, continue in effect stayed only by these proceedings. "There is thus 'an actual controversy, and adverse interests,' (citation omitted), with a 'subject-matter on which the judgment of the court can operate,' (citations omitted)." *Walling, supra,* 323 U.S. at 43.

A present case or controversy is before the Court. The observation by this Court in *S. W. Sugar Co. v. River Terminals,* 360 U.S. 411, 415-416 (1959), is eqaully applicable to this case: "The issue is one of importance in the development of the law . . . , as to which we have large responsibilities, constitutionally conferred; it is squarely presented on the record before us; and the exigencies of this litigation clearly call for its resolution at this stage."

CONCLUSION

The gist of plaintiffs' memorandum is the possibility that the district court action will culminate sometime in the Fall of 1975 and that the case pending before this Court will not be resolved for "an entire year". (Memorandum of Respondents at 3-6). As disclosed above, the current posture of the proceedings in the district court does not indicate that final disposition is imminent. On the other hand, proceedings in this Court could be resolved expeditiously under the current briefing schedule. As plaintiffs continue to assert that the documents are crucial and that their

absence threatens an adverse result in the district court, they should be expected to seek an appropriate stay in the district court.

There is a present case and controversy; this action is not moot. The due administration of justice requires the disposition of the merits of this action. If, however, this Court concludes that the matter is moot, petitioners respectfully request that the decisions and orders below be vacated, and that petitioners recover their costs in this Court.

Dated, August 12, 1975.

EVELLE J. YOUNGER,
Attorney General of the State of California.
JACK R. WINKLER,
Chief Assistant Attorney General—
Criminal Division.
EDWARD P. O'BRIEN,
Assistant Attorney General.
JOHN T. MURPHY,
Deputy Attorney General.
KARL S. MAYER,
Deputy Attorney General.
JEAN M. BORDON,
Deputy Attorney General.
Attorneys for Petitioners.